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NOTES.

SEQUESTRATION OF PRIZES IN NEUTRAL PORTS.—On the 15th of January, 1916, the British steamship *Appam* was captured by the German cruiser *Moewe*. Although twice as far from the United States as from Germany, the *Appam* was brought into Hampton Roads. Application by the prize master to the State Department for internment of the prize was denied. Subsequently, a libel was filed by British claimants, declaring that the coming in as well as the insistence on the right of asylum was a violation of the neutrality of the United States entitling the owners to restitution. The Treaty of 1799 with Prussia[1] provided that vessels of war of both parties shall carry (*conduire*) freely wheresoever they please the vessels and effects taken from their enemies without being subject to legal process. But the court decided that, as the *Appam* was not conducted in by a vessel of war, the treaty did not apply, and accordingly decreed restitution on general principles of international law.[2]

Secretary Lansing held that the Treaty of 1799 was quite evidently only intended to cover the temporary keeping of prizes in our

[1] 8 Stat. 172.

[2] The Appam (D. C., E. D. Va. 1916) 234 Fed. 389.

ports, and that this was shown clearly by the provision in the treaty that the vessels "may be freely carried out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions".[3] As the prize master on the *Appam* applied for internment and there was not a sufficient crew on board the vessel to take it out, Germany could not possibly comply with the terms of the Treaty.

Assuming that Secretary Lansing's position is right, the question then is, what are the rights of the *Appam* under general international law? It will be found on examining the authorities that there has been a distinct and sharply drawn line between the English doctrine and that of the other maritime countries.[4] It is to the great advantage of England to have sequestration of prizes in neutral ports forbidden under international law. Her colonial possessions make it comparatively easy for English cruisers to bring prizes into a port of the Empire, while France and Germany would either have to destroy prizes or run the risk of recapture if the capture were made in a locality remote from their coasts.[5] Accordingly, we find that England voted quite readily for Articles 21 and 22 of the 13th Hague Convention of 1907, which prohibited temporary asylum for prizes unless they were in distress, while her envoy, Sir Ernest Satow, made tremendous efforts for the suppression of Article 23, which allowed neutrals to admit prizes for the purpose of sequestration pending condemnation in a prize court of the captor.[6] The general rule seems to be that in the absence of any declaration to the contrary, belligerents may presume that they have a right to bring their prizes into the ports of a neutral for sequestration.[7]

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[3] *Cf.* Robert Lansing, Sec. of State, to Count Von Bernstoff, German Ambassador, March 2nd, 1916.

[4] The English doctrine is represented by The Queen *v.* The Chesapeake (Nova Scotia 1864) 1 Oldright 797; Higgins, Hague Peace Conferences, 483; 2 Op. Atty. Gen. 86 (1828); 2 Westlake, International Law, 242; Wheaton, Elements of Int. Law (5th English ed. by Coleman Phillipson) 695; Risley, Law of War, 176; Hall, International Law (4th ed.) 642. The opposite doctrine is illustrated by 1 Hautefeuille, Des Droits et des Devoirs des Nations Neutres (3rd ed.) 351 *et seq.;* C. Dupuis, Droit de La Guerre Maritime, § 326; *cf.* Bonfils, Droit International Public, § 1469; Bluntschli, Droit International Codifié, 357. The practice of condemning property as prize while lying in a neutral port has been almost universally upheld. The Arabella and Madeira (U. S. C. C. 1815) 2 Gall. 367; 3 Phillimore, International Law, § 379; *cf.* The Henrick and Maria (1799) 4 C. Rob. 43; 2 Halleck, International Law, 436; *contra, cf.* Wheaton, Captures, 261.

[5] C. Dupuis, Droit de La Guerre Maritime, § 287.

[6] Great Britain and Japan were the principal powers voting against the adoption of Article 23 in committee. The United States abstained from voting. The United States, Great Britain, and Japan reserved the article in signing the convention. Higgins, Hague Peace Conferences, 479; 2 Westlake, International Law, 242; 2 Am. Jour. of Int. Law, 524 *et seq.*; C. Dupuis, Droit de La Guerre Maritime, 287. This convention was not to become law between a belligerent and a neutral unless both belligerents had signed the convention. 13th Hague Convention of 1907, Art. 28.

[7] 2 Halleck, 169, § 10; 1 Hautefeuille, Des Droits et des Devoirs des Nations Neutres (3rd ed.) 351; Bonfils, Droit International Public, § 1469; Mr. Wheaton to Mr. Upshur, Sec. of State, November 10th, 1843; 7 Moore, Digest, § 1314; 2 Pitt Cobbett, Leading Cases on Int. Law (3rd ed.) 359; 7 Op. Atty. Gen. 122, 129 (1855); *cf.* Deutsche Prisenordnung § 111.

Our position on this question has not, unfortunately, been uniformly on one side or the other. In the latter part of the 18th and first part of the 19th centuries, we went as far as to allow countries under treaty to sell their prizes in our ports even before condemnation.[8] Between that time and the Hague Convention of 1907, we sometimes allowed prizes to be brought in without decreeing restitution,[9] but on one occasion declared in absolutely unqualified terms that we would not admit them.[10] Has our reservation of the 23rd Article of the 13th Hague Convention of 1907 committed us to any definite stand on the subject and declared that we will not receive prizes of the belligerents in our ports for sequestration while in a state of neutrality? On the answer to this question, assuming our hypothesis to be true, depends the solution of the *Appam* Case. That this may not be a definite declaration of our attitude is shown by our refusal to sign the Declaration of Paris, which abolished privateering, because no exemption from capture of private property at sea was granted. Since the Declaration of Paris, however, we have never used privateers and have declared our intention not to do so.[11] It would seem then that this is not a sufficiently definite statement of our attitude to overrule the presumption that prizes will be admitted.

It is decidedly to our interest to be allowed to sequester our prizes in neutral ports, as is shown by the case of the *Bergen* Prizes.[12] This rule if adopted would be a contribution to world peace in tending to prevent the race for naval stations. The argument on the other side of the question, that the neutral would be supplying a naval base for one belligerent, causing resultant friction with the other, is answered by the fact that the second belligerent has no cause for objecting to a right granted under the rules of international law. The provisions of the 23rd Article of the 13th Hague Convention allowing sequestration of prizes in neutral ports certainly equalize the situation of the belligerents. As the delegations backing its adoption urged, it would tend to prevent the destruction of prizes, thus lessening to a great extent the damages to world commerce which result from the sinking of merchant vessels.[13]

If the ruling of Secretary Lansing that the Treaty of 1799[14] does not apply to cases of indefinite asylum is not correct, the *Appam* certainly should not have been restored to the British claimant. The distinction mentioned in the opinion of the court between prizes convoyed in and coming in alone is certainly viduous, and has never been recognized. On the contrary, cases arising under Section 17 of the

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[8] See Consul of Spain *v.* Consul of Great Britain (C. C. 1808) 6 Fed. Cas. No. 3138.

[9] *Cf.* the case of the Sitka, a Russian prize brought into San Francisco harbor by the British cruiser President. 7 Op. Atty. Gen. 122 (1855); Reid *v.* The Vere (D. C. 1795) 20 Fed. Cas. No. 11, 670; *cf.* Moore, Digest, § 1302; 1 Op. Atty. Gen. 78 (1797); but see Stockton, International Law, 408.

[10] 7 Moore, Digest, 938.

[11] Stockton, International Law, 48.

[12] 5 Moore, International Arbitrations, 4572; 7 Moore, Digest, § 1314.

[13] C. Dupuis, Droit de La Guerre Maritime, § 325; *cf.* Taylor, International Public Law, 581; 2 Am. Jour. of Int. Law, 524.

[14] 8 Stat. 172.

French Treaty of 1778,[15] which is substantially the same as the 19th Section of the Prussian Treaty of 1799,[16] have been treated similarly under both situations.[17] As the Treaty with Prussia is not contrary to international law and does not seem to violate any settled policy of our municipal law, it certainly should be upheld instead of being construed so strictly as to divest it of all force. By its provisions, the 13th Hague Convention of 1907 does not impair any of the existing treaty rights between nations,[18] and consequently has no effect to repeal the Treaty of 1799. In whatever light the case is viewed, the opinion of the court seems most unfortunate.

EFFECT OF WAR ON CONTRACTS BETWEEN ENEMY BELLIGERENTS.—The basic doctrine which underlies all adjudications on the effect of war on contracts between enemy belligerents[1] is that all intercourse with the enemy which in any way aids him is illegal.[2] In some cases this prohibition has been held to extend to every kind of intercourse whatsoever;[3] while other courts, reasoning from the premise that the modern tendency is to lessen, as far as possible, the shock which war gives to the social and economic systems of the world, have reached the conclusion that it is only commercial trading, and not all intercourse, which is interdicted.[4] While some difficulty may be experienced in drawing the line, the greater desirability of the latter view, from a humane and progressive standpoint, seems hardly open to question.

A discussion of the practical application of this principle must necessarily be divided into two parts, according to whether the contract under consideration was made during or before the war. In regard to the first class, the general rule is that contracts made with an enemy belligerent, during the progress of a war, are absolutely void.[5] The State may license such contracts;[6] but otherwise the only excep-

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[15]8 Stat. 22.

[16]8 Stat. 172.

[17]Salderondo *v.* The Nostra Signora del Carmino (D. C. 1794) 21 Fed. Cas. No. 12, 247; Reid *v.* The Vere, *supra.*

[18]Preamble to 13th Hague Convention, 1907.

[1]For recent English legislation on this subject, see the various Trading with the Enemy Acts, 1914-1916, 4 & 5 Geo. V, c. 87; 5 & 6 Geo. V, cc. 12, 79, 98, 105. See also Trotter, Law of Contract During War.

[2]The Hoop (1799) 1 C. Rob. 196; Hill *v.* Baker (1871) 32 Iowa 302; The Panariellos (1916) 32 T. L. R. 459; 1 Kent, Comm. *66.

[3]Robson *v.* Premier Oil & Pipe Line Co. [1915] 2 Ch. 124; see Griswold *v.* Waddington (N. Y. 1819) 16 Johns. *438.

[4]United States *v.* Barker (C. C. 1820) 24 Fed. Cas. No. 14,517; Kershaw *v.* Kelsey (1868) 100 Mass. 561; *cf.* Williams *v.* Paine (1897) 169 U. S. 55, 70, 18 Sup. Ct. 279.

[5]Willison *v.* Patteson (1817) 7 Taunt. 439; Scholefield *v.* Eichelberger (1833) 32 U. S. *586; see Watts, Watts & Co. *v.* Unione Austriaca etc. (D. C. 1915) 224 Fed. 188; 15 Columbia Law Rev. 608. This is true, whether the contracts are made directly, or indirectly through a neutral agent or partner. See Montgomery *v.* United States (1872) 82 U. S. 395.

[6]Matthews *v.* McStea (1875) 91 U. S. 7; see Potts *v.* Bell (1800) 8 T. R. 548; Crawford *v.* The William Penn (C. C. 1819) 6 Fed. Cas. No. 3,373.